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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 384

EDWARD M. GARLOCK,

Petitioner,

v.

SURFACE TRANSIT INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD M. GARLOCK,
Petitioner pro se
521 Fifth Avenue,
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September 8, 1959

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays a writ of certiorari to review the final order or judgment of the United States Court of Appeals for the Second Circuit which, among other things, reduced the allowance awarded him by the United States District Court for the Southern District of New York for his services in the proceedings in that court for the reorganization of Third Avenue Transit Corporation and its operating subsidiaries.

Opinions Below

The opinions of the District Court are not reported; they are printed at pages 2-69 of the separately printed Appendix recently filed in this Court with the petition of Saxe, Bacon & O'Shea for a writ of certiorari to review the same order or judgment (No. 285). The opinion of the Court of Appeals is reported at 266 F.2d 862 and is printed at pages 70-81 of said Appendix.

Jurisdiction

The final order or judgment sought to be reviewed was entered on May 11, 1959.

Three timely petitions for rehearing were filed in the Court of Appeals, pursuant to Rule 25 of the Rules of that Court. One of them was filed by Hays, St. John, Abramson & Heilbron; and, as the opinions below show, it directly involved both the propriety and the amount of petitioner's allowance.[1]

Jurisdiction of this Court is invoked under 28 USC § 1254(1).

Questions Presented

1. Does the command of Rule 52(a) of the Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous", govern review of a district court order which awards allowances of reasonable compensation under sections 241, 242 and 243 of the Bankruptcy Act?

2. If it does not, then, in the absence of any abuse of discretion by the district court in making such an order, may the reviewing court determine such allowances *de novo* and substitute its determinations thereof for those of the district court?

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1. Appendix in No. 285, pp. 35-41, 76.

Statutes Involved

Sections 241 and 250 of the Bankruptcy Act, 11 USC §§ 641 and 650, are printed at page 1 of the Appendix in No. 285.

Bankruptcy Act § 242, 11 USC § 642:

"Representatives and Other Parties in Interest; Attorneys Therefor

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Bankruptcy Act § 243, 11 USC § 643:

"Creditors and Stockholders; Attorneys Therefor

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed

or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

Rule 52(a), F.R.C.P., 28 USC following § 723c:

"Rule 52. Findings by the Court.

(a) EFFECT . . . Findings of fact shall not be set aside unless clearly erroneous, . . ."

General Orders In Bankruptcy Nos. 36 and 37, 11 USC following § 53:

"Order 36. Appeals

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States."

"Order 37. General Provisions.

In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. . . ."

Statement of the Case

The history of the proceedings below, for the reorganization of the Third Avenue Transit System under Chapter X of the Bankruptcy Act, is reviewed in the opinion of the District Court,[2] and petitioner's services, as counsel for the petitioning creditors, are briefly summarized there.[3] Those services began in the winter of 1947-48 and continued until the "unusually successful" reorganization was completed late in 1956.

2. Appendix in No. 285, pp. 5-19.
3. *Id.* pp. 36, 39-41.

The District Judge said, among other things:

> "Except for counsel for the Trustee, no other lawyer or firm of lawyers to whom I am making an award contributed more than Mr. Garlock to the successful reorganization of the Third Avenue System."[4]

He found that petitioner had spent "at least 7,500 hours" in rendering services.[5] He concluded:

> "Considering the contributions made to the estate as a whole, to the Refunding Bondholders, to the plans and to the successful institution of these proceedings, I find that $20 per hour is a minimum of reasonable compensation."[6]

And he thus determined and awarded $150,000 as petitioner's minimum reasonable compensation.

The Court of Appeals reduced that award to $132,500, a maximum hourly rate of $17.66.[7]

* * * * *

It is important to emphasize here what the Court of Appeals did not do, in support of this or other reductions of awards by the District Court. Among other things:

(1) it did not mention Rule 52(a), nor did it set aside any finding of fact as clearly erroneous;

(2) it found no abuse of discretion;

---

4. *Id.* p. 40.
5. *Id.* p. 41.
6. *Ibid.*
7. The SEC recommended an aggregate allowance of $145,000 to petitioner and, his co-counsel, the firm of Hays, St. John, Abramson & Heilbron, and an allocation of $115,000 to petitioner and $30,000 to the firm. The Court of Appeals affirmed the District Court's award of $10,000 to the firm. Hence its reduction of petitioner's award reduced the aggregate of both awards to $142,500, or $2,500 less than the SEC's aggregate recommendation.

(3) it found no failure to consider any relevant factor, and no other error of law; and

(4) it did not adopt and enforce the recommendations of the SEC.

It is equally important to note what the Court of Appeals did do:

(1) After concluding that "Ultimately, however, the court's determination (of reasonable compensation) must be made on the facts and circumstances of each case,"[8] it proceeded to make its own determinations, although the enormous record before it precluded adequate appellate comprehension of the facts and circumstances of this case.

(2) It acknowledged the validity of the District Court's finding that "the estate can well afford to bear an aggregate payment of $2,068,504.73", but was "constrained to disagree with specific awards".[9]

(3) It assigned as reasons for those disagreements considerations which the District Court had expressly and carefully weighed.

(4) It reduced nine awards; and seven of them, as thus reduced, substantially exceeded the corresponding recommendations of the SEC.

* * * * * *

The Court of Appeals considered and reduced the awards to petitioner and two other representatives of the senior Refunding Bondholders in the following paragraph:[10]

"Because of their great assistance to the court, Judge Dimock also granted awards substantially in excess of the SEC's recommendations to Kelley, Drye, Newhall & Maginnes, counsel to the indenture

8. Appendix in No. 285, p. 74.
9. *Id.* pp. 23, 74.
10. *Id.* pp. 75-76.

trustee, to Edward M. Garlock, and to counsel for the Amott Committee, Messrs. Seligson, Burke, and Yohalem. While neither the Commission nor the reorganized companies on this appeal depreciate the value of these counsel's services, yet in view of the degree of duplication the Commission found in the efforts of the bondholders' representatives we must hold that the court's increases of the Commission's recommended allowances, ranging from 30% in the case of Mr. Garlock to 50% to Mr. Seligson and his associates, were excessive. We award the Kelley firm $117,500, Mr. Garlock $132,500, and Mr. Seligson et al. $125,000."

But the District Court had carefully considered and given full weight to the only reason thus assigned for slashing these awards:[11]

"In reaching the results indicated I was guided by the instructions of the Court of Appeals in the *Childs* case with respect to duplication of effort by counsel. I understand that, in spite of the policy of the Chandler Act toward democratization of representation in reorganization proceedings, each representative is not entitled to a full fee but that the amount available as proper compensation for the work necessary for the parties represented must be divided among counsel appearing for persons having a common interest.

"The amount which I have allowed for representatives of the Refunding Bondholders, $606,303.11, does not exceed what would be properly payable if there were but one bondholders' committee and one counsel. . . . . The Refunding Bondholders went through the proceedings and were paid out substantially at par. The aggregate afforded their representatives is little more than 3.2% of their interest of $18,500,000. Moreover, some of the counsel for the Refunding Bondholders, notably Edward M. Garlock, who appeared for Refunding Bondholders as petitioning creditors, and Harold P. Seligson and Morton E. Yohalem, who appeared for the

11. *Id.* pp. 24-25.

> Amott Committee, contributed services which redounded to the benefit of the entire estate of a value at least equal to that of the services which they rendered to the Refunding Bondholders who were their only nominal clients."

And the reason thus assigned, and the plain implication of unwarranted and avoidable duplication, is not supported by the record. The only relevant statements of the SEC in the record follow:

> "In this proceeding the Hanover Bank and its counsel were most active, and I should note that the Hanover Bank and the other representatives of the refunding bondholders succeeded in achieving a degree of unanimity and common cause, common action, which I personally have never seen in any proceeding. That was something which was of great value, we feel, not only to the refunding bondholders as affording them a strong and united voice, but also, and very properly, to the estate in eliminating to a certain degree the duplication of effort that sometimes necessarily follows where there is a multiplicity of representation."[12]

> "I might at this point note that within the refunding bondholder group as a whole, the joint efforts that developed did contribute to a lessening of the duplication that sometimes necessarily attends multiplicity of representation.
>
> "We don't feel that it was completely eliminated by a long shot, but we do feel that the fact that the refunding bondholders did get together and did succeed in some measure in parceling out various areas of activity so that the principal burden would be borne by one member of the group, with others perhaps participating in a lesser fashion, did contribute to holding down the duplication of effort within the group."[13]

12. S.M. 24925-6; Appendix to brief of appellants Surface Transit, Inc., et al. below, p. 201.
13. S.M. 24945; Appendix to brief of appellants Surface Transit, Inc., et al. below, p. 212.

Moreover petitioner, who was the first representative of the Refunding Bondholders, cannot be fairly charged with duplicating the efforts of those who later volunteered to represent the same class.

* * * * *

The foregoing analysis demonstrates that the Court of Appeals asserted and exercised the power to determine anew difficult and delicate questions of fact peculiarly within the competence of the District Court, and that it did so on grounds beyond its appellate powers in other cases.

Reasons for Granting the Writ

1.

The decision below cannot stand if Rule 52(a) is applicable to district court determinations of reasonable compensation in Chapter X cases.

It is in conflict with *In Re American Mail Line*, 115 F.2d 196, 199 (CA 9, 1940), which held that Rule 52(a) governs review of such determinations.

And this Court's reliance on the Rule in *Reconstruction Fin. Corp. v. Denver & Rio G. W. R. Co.*, 328 U.S. 495, 533, respecting a district court finding that the plan there was fair and equitable to dissenting bondholders, strongly suggests a conflicting view.

A determination of this question is essential to sound and uniform administration of estates under Chapter X of the Bankruptcy Act.

2.

The decision below is in conflict with decisions of other Courts of Appeals, which respect district court determinations of reasonable compensation in Chapter X cases in the absence of abuse of discretion.

Petitioner here relies on the cases cited in section I at pages 5-6 of the petition for a writ in No. 285, and adds *In Re 32-36 North State St. Bldg. Corporation*, 164 F.2d 205, 206 (CA 7, 1947).

Here too, if Rule 52(a) does not apply, a determination of this question is essential to sound and uniform administration of estates under Chapter X of the Bankruptcy Act.

3.

The decision below is in conflict with the views expressed by this Court in the decisions cited in section II at page 6 of the petition for a writ in No. 285.

4.

The decision below impairs the dignity and independence of the district courts in the Second Circuit, arrogates to the Court of Appeals in Chapter X cases a power it does not enjoy and may not exercise in other cases, and discourages competent representation in a special class of cases affected with a public interest.

CONCLUSION

For the reasons stated above this petition raises issues of serious import transcending petitioner's grievance as a private litigant. The writ should be granted.

Respectfully submitted,

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New York 17, New York.

September 8, 1959

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Respondents

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

Edward M. Garlock, co-counsel for petitioning creditors, in the Chapter X reorganization of the Third Avenue Transit System, requests this Court to review the evidence and the facts and circumstances which "constrained" the Court of Appeals, Second Circuit, to determine that the reasonable value of his services was $132,500 rather than the $150,000 awarded to him by the District Court. The District Court had also awarded to Petitioner's co-counsel, the firm of Hays, St. John, Abramson & Heilbron $10,000—amounting in the aggregate to—$160,000 (A. 44-53, 73).*

Reference "A."— Appendix to Brief in the Court of Appeals of Appellants, Surface Transit, Inc., et al., the Reorganized Companies, filed in this Court by Baker, Obermeier & Rosner in No. 284, Oct. Term, 1959.

The SEC had recommended to the District Court an allowance of $115,000 to Petitioner and $30,000 to his co-counsel, Hays, St. John, Abramson & Heilbron—aggregating—$145,000 (A. 50, 73).

The Court of Appeals reduced the award to Petitioner from $150,000 to $132,500, and affirmed the $10,000 award to Hays, St. John, Abramson & Heilbron, making an aggregate award of $142,500 or $17,500 less than the aggregate of the District Court's awards to these claimants.

In our brief in opposition to the petition for certiorari (No. 285) of Saxe, Bacon & O'Shea, attorneys for the trustees, in the reorganization of the Third Avenue Transit System, we have set forth at length pertinent facts bearing upon the total allowances in the reorganization, to the 45 claimant committees, individuals and attorneys, aggregating $2,068,000- (pp. 2-8). These facts are necessary to an adequate understanding of the present petition of Edward M. Garlock, and we respectfully refer the Court to them, to avoid needless repetition.

POINT FIRST

Petitioner's statement of the "questions presented", like the statement of Petitioner, Saxe, Bacon & O'Shea (No. 285), is based upon the unfounded assumption that the Court of Appeals did not find the determination of the District Court "clearly erroneous" or "an abuse of discretion", and Petitioner's entire argument is, therefore, devoid of merit.

I

Essentially, Petitioner's "Questions Presented" (p. 2) are the same as the "Question Presented" in the petition of Saxe, Bacon & O'Shea (No. 285). Simpli-

fied somewhat, Petitioner's questions are: Does the "clearly erroneous" test of Rule 52a FRCP govern review of the District Court's allowance order; and, if not, then *in the absence of any abuse of discretion*, by the District Court, may the Court of Appeals determine such allowance *de novo?* The clear implication is, of course, that the Court of Appeals neither found the allowance of the District Court "clearly erroneous" nor "an abuse of discretion", and, therefore, ed in reducing it.

Implicitly, Petitioner regards the "clearly erroneous" test and the "abuse of discretion" test as representing different standards—the first, perhaps, more rigorous and exacting then the second. Petitioner, Saxe, Bacon & O'Shea (No. 285), on the other hand, equates the "clearly erroneous" test with the "abuse of discretion" test, saying they appear "comparable" (pp. 5-6). There is no distinction of substance between them.

Petitioner contends that the Court of Appeals did not find the determination of the District Court "clearly erroneous" or an "abuse of discretion" (p. 5). On the contrary, we submit that the Court clearly found against Petitioner under both standards, reducing his award "in view of the degree of duplication the Commission found in the efforts of the bondholders' representatives", including Mr. Garlock, and because, on all the facts it found the award "excessive" (pp. 6-7). These findings and the resultant reduction were a determination that the award of $150,000 was "clearly erroneous", and if the Court had wished to use the somewhat more unpleasant phrase it could have characterized it as "an abuse of discretion."

The arguments presented in Point First (pp. 9-10) of our brief in opposition to the petition of Saxe, Bacon & O'Shea (No. 285), are directly pertinent here, and, again, to avoid needless repetition, we respectfully refer the Court to them.

II

Petitioner, Garlock, further asserts (p. 9) that the Court of Appeals determined questions of fact "on grounds beyond its appellate powers in other cases"; and arrogated to itself in this Chapter X case "a power it does not enjoy and may not exercise in other cases" (p. 10). These assertions are unwarranted.

Section 250 of the Bankruptcy Act (11 U. S. C. § 650; 52 Stat. 901), which provides for appeals from *allowance orders* in Chapter X reorganization cases, does not limit the jurisdiction or scope of review by Courts of Appeals. It provides in part:

> "Appeals may be taken in matters *of law or fact* from orders making or refusing to make allowances of compensation or reimbursement, and may, *in the manner* and within the time provided for appeals by this title, be taken to and allowed by the Court of Appeals . . ." (Emphasis added)

Section 121 of the Bankruptcy Act (11 U. S. C. § 521; 52 Stat. 885), governing appellate jurisdiction in Chapter X cases, other than appeals from allowance orders, broadly provides:

> "Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a *bankruptcy proceeding*." (Emphasis added)

Jurisdiction of Courts of Appeals in *a bankruptcy proceeding* is provided for in Section 24 of the Bankruptcy Act, (11 U. S. C. § 47; 30 Stat. 553, amended by 52 Stat. 854 and 62 Stat. 992). That Section grants to Courts of Appeals the broadest possible appellate powers:

> ". . . to review, affirm, *revise* or reverse, both in matters of law and in matters *of fact* . . ." (Emphasis added)

Thus the Court of Appeals in the present case found that certain of the awards by the District Court, including that to the Petitioner, Garlock, were excessive and unreasonable and, under its uncurtailed powers of review, properly *revised* or modified those awards.

III

Petitioner, Garlock, also contends (p. 9) that the decision *In Re American Mail Line*, 115 F. 2d 196, 199 (CA 9, 1940), is in conflict with the decision of the Court of Appeals here, and that the decision of this Court in *Reconstruction Finance Corp.* v. *Denver & Rio G. W. R.*, 328 U. S. 495, 533 also strongly suggests a conflicting view. We have examined both of these decisions, cited by Petitioner without discussion, and find no conflict and little, if any, pertinence to the present question.

Petitioner also states (p. 10) that he relies on the cases cited in Section I (pp. 5-6) of the Petition of Saxe, Bacon & O'Shea (No. 285), and to these he adds *In re 32-36 North State St. Bldg. Corporation*, 164 F. 2d 205, 206 (CA 7, 1947). As pointed out in respondents' brief (pp. 10-11) in opposition to the peti-

tion of Saxe, Bacon & O'Shea (No. 285), we find that none of the cited cases, in fact, conflicts with the decision of the Court of Appeals here. This is also true of the additional case cited by this Petitioner, and referred to above.

Petitioner further claims (p. 10) that the decision of the Court of Appeals below is in conflict with the views expressed by the United States Supreme Court in the decisions cited in Section II, p. 6, in the Saxe, Bacon & O'Shea petition (No. 285). As stated in respondents' brief (p. 12) in opposition to that petition (No. 285) those decisions are obviously not in point, and neither that Petitioner nor Petitioner, Garlock, shows any respect in which they are claimed to be in conflict.

POINT SECOND

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
October 1, 1959